

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070841
	:	TRIAL NO. C-07CRB-19744
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
	:	
FRANK SANDERS,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Frank Sanders appeals his conviction for attempted child enticement. We reverse the trial court's judgment in part because we conclude that the trial court erred when it designated Sanders a sexually oriented offender without having first determined that the offense was committed with a sexual motivation.

On May 31, 2007, Sanders was charged with child enticement in violation of R.C. 2905.05. The state alleged that he had yelled an obscenity at four children as he drove past them. On July 24, 2007, Sanders filed a motion requesting that new counsel be appointed to represent him. The trial court denied his motion. Sanders later pleaded guilty to attempted child enticement. The trial court sentenced him to 80 days in the Hamilton County Justice Center and gave him credit for 80 days served. After sentencing Sanders, the court held a hearing to determine whether Sanders should be adjudicated a sexual predator. At the conclusion of the hearing, the trial court determined that Sanders was not a sexual predator, but that he was a sexually oriented offender.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Sanders filed a pro se motion captioned “Motion to uphold our original plea agreement and take off my having to register as a sexual offender.” After a hearing, the trial court denied the motion.

In his first assignment of error, Sanders asserts that the trial court erred when it denied his motion for the appointment of new counsel. In his motion, Sanders stated that his attorney had not seen him, that his attorney had not done what Sanders had asked of him, and that his attorney had called him names. Sanders also requested that the court appoint a specific attorney for him.

Sanders “was not entitled to choose his own lawyer at taxpayer expense, but rather was entitled to competent, effective representation from the lawyer appointed by the court.”² To succeed on his motion, Sanders had to demonstrate that there was a complete breakdown in his relationship with his attorney.³ We review the trial court’s decision under an abuse-of-discretion standard.⁴

Here, the trial court asked Sanders about his complaints and questioned Sanders’s attorney about the allegations. Sanders did not demonstrate that there had been a complete breakdown in his relationship with his attorney. Rather, he showed that there was a disagreement between them about how to proceed. In his appellate brief, Sanders points to the trial court’s statement that he and his attorney “need[ed] to work together.” The court made the statement after Sanders’s counsel advised Sanders to “get [his] hands back” when Sanders tried to give something to the trial court. The statement was made well after the hearing on Sanders’s motion, and the events leading up to it did not demonstrate a breakdown in the attorney-client relationship. After reviewing the record,

² *State v. Gordon*, 149 Ohio App.3d 237, 2002-Ohio-2761, 776 N.E.2d 1135, at ¶11.

³ *State v. Coleman* (1988), 37 Ohio St.3d 286, 292, 525 N.E.2d 792.

⁴ *Thurston v. Maxwell* (1965), 3 Ohio St.2d 92, 93, 209 N.E.2d 204.

we conclude that the trial court did not abuse its discretion when it denied Sanders's motion for the appointment of new counsel.

In his second assignment of error, Sanders asserts that the trial court erred when it accepted his guilty plea, because it did not comply with Crim.R. 11. Sanders argues that the trial court did not inquire about the voluntariness of his plea, and that the court did not inform him that he could be adjudicated a sexually oriented offender. For these reasons, Sanders contends that his plea should be vacated.

Crim.R. 11(D) requires that, before accepting a plea of guilty to a misdemeanor that is a serious offense, the trial must address the defendant personally, inform him about the effect of his plea, and determine that the plea is being made voluntarily. In contrast, Crim.R. 11(E), which applies to misdemeanors that are petty offenses, does not require that the court determine that the plea is being made voluntarily before accepting it. Nor does the court need to explain the plea's collateral consequences, such as being adjudicated a sexually oriented offender.⁵ Rather, the court need only inform the defendant about the effect of his plea.⁶ To satisfy this requirement, "a trial court must inform the defendant of the appropriate language under Crim.R. 11(B).

Here, Sanders pleaded guilty to attempted child enticement, which is a petty offense.⁷ The trial court was not required to ensure that the plea was being made voluntarily. Prior to accepting the plea, the trial court asked Sanders, "Do you understand, when you plead guilty, you are completely admitting your guilt to this offense? Do you understand what the word guilty means?" Sanders responded, "Yes, sir." We conclude that the trial court complied with Crim.R. 11. It did not err when it accepted the plea. The second assignment of error is overruled.

⁵ See *State v. Lambert* (May 25, 1999), 10th Dist. No. 98AP-941.

⁶ *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, paragraph one of the syllabus.

⁷ Crim.R. 2(D).

Sanders's third assignment of error is that he was deprived of the ineffective assistance of counsel. To prevail on this assignment of error, Sanders must demonstrate that his counsel's performance was deficient and that, absent his counsel's errors, the result of the trial would have been different.⁸ Our review of counsel's performance must be "highly deferential."⁹

After the trial court sentenced Sanders and adjudicated him a sexually oriented offender, Sanders filed a pro se motion requesting that the trial court reconsider its decision regarding Sanders's sexually-oriented-offender status. During the hearing on the motion, Sanders's trial counsel admitted that he had incorrectly advised Sanders that "[the attempted child enticement charge] would not require him to register under the statute that was being cited at the time." This advice was incorrect because, under former R.C. Chapter 2950, which was in effect at the time of Sanders's plea, the offense could have been classified as a sexually oriented offense for which Sanders could have been adjudicated a sexually oriented offender.¹⁰

Even though we conclude that counsel's performance was deficient with respect to the advice, we are unable to conclude that the result of the proceedings would have been different had counsel given the correct information. Sanders did not dispute that he had done the act for which he was charged. Instead, he challenged the collateral consequence of the sexually-oriented-offender designation. Because the result of the proceedings would not have been different absent counsel's error, we cannot conclude that Sanders was denied the effective assistance of counsel. The third assignment of error is without merit.

⁸ See *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

⁹ *Strickland*, supra, at 689.

¹⁰ R.C. 2950.01(D)(1)(b)(vi).

In the fourth assignment of error, Sanders asserts that the trial court erred when it failed to grant his motion to mitigate his sentence or to withdraw his plea. But in his pro se motion, Sanders did not challenge his sentence or the underlying plea. We accordingly recast the assignment of error to assert that the trial court erred when it adjudicated Sanders a sexually oriented offender. And for the reasons that follow, we conclude that the assignment of error, as recast, has merit.

Under former R.C. 2950.01(D)(1)(b)(vi), which was in effect at the time that Sanders was sentenced, attempted child enticement was a sexually oriented offense only if it was committed with a sexual motivation. The standard is the same under the recently amended R.C. Chapter 2950.¹¹ Before the trial court could have designated Sanders a sexually oriented offender, it had to determine whether Sanders had committed the offense with a sexual motivation. It is clear from the record that the trial court did not make such a determination. We therefore reverse the trial court's judgment with respect to the adjudication, and we remand the cause for the trial court to determine whether the offense was committed with a sexual motivation. In all other respects, we affirm the judgment of the trial court.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HILDEBRANDT and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 27, 2008

per order of the Court _____.
Presiding Judge

¹¹ See R.C. 2950.01(A)(10).